United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1887

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

P/S

G. HINTON, Leaseholder

Plaintiff-Appellant

-against-

CONRAD SCHUBKEGEL, individually
and Executor of Estate of
KATARINA SCHERER,

Defendant-Appellee

ON APPEAL FROM A DECISION OF THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLEE

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2

TABLE OF CONTENTS

	PAGE
ISSUE PRESENTED	A
STATEMENT OF CASE	B
ARGUMENTS	
I. Title to the premises passed to the legatees upon the death of Katarina Scherer on December 20th, 1965.	1.
II. All of the claims raised by the plaintiff have been covered in the multiple suits brought by this plaintiff in both the Federal and State Courts. There is no basis for further relief in this new action commenced in 1973.	3.
III. The statute of limitation has run against the plaintiff for his alleged cause of action on the lease.	5.
IV. The statute of limitation has run against the plaintiff for his action in tort.	7.
V. The plaintiff is the wrong party in interest and is not entitled to any relief	9.
CONCLUSION	10.

TABLE OF CITATIONS

	PAGE
In re Taylor's Will, 95 N.Y.S.2d 459 (195)	1
In re Rich's Estate 211 N.Y.S. 2d 68, 72 Misc. 2d 364, appeal dismissed 217 N.Y.S. 2d 493, 13 A.D.2d 749 (1961) reargument denied 218 N.Y.S. 2d 545, 13 A.D. 2d 760	1
In re Hermann's E tate 82 N.Y.S. 2d 888, 193 Misc. 466 (1948)	1
In re Reilly's Will 24 N.Y.S. 2d 213, 175 Misc. 597	1
Hinton v. DeRosa, 73 Civ. 3069 1973 U.S.D.C.	3
Wakol v. Sequin 167 Misc. 463	6

TABLE OF STATUTES

	PAGE
New York Real Property Law Section 248 (McKinney 1968)	2
New York Civil Practice Law and Rules Section 213 (McKinney)	5
New York Multiple Dwelling Law Section 301 and 302 (McKinney)	5
New York Civil Practice Law and Rules Section 214 (McKinney)	7

A

ISSUE

Did the sale of the property by the legatees in 1969, and the subsequent fire in 1970, give this plaintiff a number of causes of action which he could begin on October 19, 1973, against the Estate and Executor of KATARINA SCHERER who died on December 20, 1965?

STATEMENT OF THE CASE

On February 15, 1961, KATARINA SCHERER entered into a three year lease for a store and apartment at 1292 Madison Avenue, New York, N.Y. with the MISSIONERS PARENT CHURCH, a religious Corporation organized under the laws of the State of New York. After the expiration of the original term, the Church continued to occupy the store and apartment on a month to month basis. On December 20, 1965, the landlord, KATARINA SCHERER died. Her will was admitted to probate in the New York Surrogate's Court on July 7, 1966. Under the terms of her will she specifically devisedthe building to her niece, SUSAN S. DE ROSA and her two children, JOSEPH DE ROSA and PATRICIA DE ROSA.

In January of 1969, the legatees sold the building to the MT. SINAI HOSPITAL, and the Church paid the rent to the new owners. A year and one half later on July 4, 1970, a fire destroyed the building and the structure was condemmed by the City and the Church had to vacate the premises.

On October 19, 1973, the plaintiff, an officer of the Church corporation, commenced this action against the executor of the estate for damages contending that the sale to MT. SINAI violated some rights of the plaintiff, and that the

fire caused injuries to the plaintiff and the defendant, individually, and as executor was responsible. The executor moved for summary judgment in the Court below for lack of diversity, and that the alleged cause of actions were barred by the Statute of Frauds, the Statutes of Limitation, for res adjudicata due to decisions in the New York State Supreme Court, and finally that the plaintiff was not the proper party in interest.

On April 23, 1974, the District Court by Honorable CHARLES M. METZNER granted the motion for summary judgment. On May 6, 1974, the Court also denied the plaintiff!s motion to vacate the opinion.

This plaintiff has started at least six separate suits on these matters and the status of each are as follows:

(a) M.P. Church v. Katarina Scherer -3/18/70 -U.S.District Court 70 Civ.1082 - withdrawn
(b) G. Hinton v. Katarina Scherer - dismissed, appeal dismissed - 71-1399 - 6/17/71 -U.S.Court of Appeals
(c) Hinton v. Schubkegel and Estate of Katarina Scherer N.Y. State Supreme Court -dismissed,decision of State Supreme Court Justice BIRDIE AMSTERDAM dated 9/11/73
(d) Hinton v. DeRose (intervening legatees who inherited property form Katarina Scherer) N.Y. State Supreme Court - dismissed,decision of State Supreme Court Justice FRANCIS ELOUSTEIN dated 1/26/73
(e) Hinton v. DeRose, 73 Civ.3069, dismissed 11/5/73- Justice D.J.TYLER, U.S. District Court, Southern District
(f) Hinton v. Schubkegel and Estate of Katarina Scherer, 73 Civ.4489,dismissed 4/24/74, Justice D.J.TYLER, United States District Court -motion to vacate opinion denied May 6, 1974.

The tactics of the plaintiff is to flood the defendants, the courts, and all concerned with a tidal wave of paper to such an extent that he hopes to wear everyone down despite the constant dismissals of all his claims in both the State and Federal Courts. It became so bad at one point that Judge LASKER on July 22, 1970, wrote the following letter to the plaintiff, (copy of letter in record):

> "Dear Mr. Hinton:
>
> I have now received from you voluminous papers in the above entitled matter, which have become burdensome both to the court and to counsel for the other parties. At this time I am ordering you to submit no further papers to the court in this matter. If upon study of the case I conclude that further papers are required, I will advise you.
>
> Very truly yours,
> MORRIS E. LASKER "

Naturally, the plaintiff appealed this letter and his appeal was dismissed. His tactics, as can be seen by the record, are continuing in the present case; the sixth that he has brought covering the same issues in both the State and Federal Courts.

ARGUMENT

I

TITLE TO THE PREMISES PASSED TO THE LEGATEES UPON THE DEATH OF KATARINA SCHERER ON DECEMBER 20, 1965.

It is settled law in New York, that upon the death of the testator his real property vests in the legatees and the executor takes no title to the premises. In re Taylor's Will, 95 N.Y.S.2d 459 (1950), In re Rich's Estate 211 N.Y.S.2d 68, 27 Misc.2d 364, appeal dismissed 217 N.Y.S. 2d 493, 13 A.D.2d 749 (1961) reargument denied 218 N.Y.S.2d 545,13 A.D.2d 760, In re Hermann's Estate 82 N.Y.S.2d 888, 193 Misc.466 (1948), in re Reilly's Will, 24 N.Y.S.2d 213, 175 Misc. 597. In the Reilly case, supra, the Court defined this concept clearly by saying, "Realty specifically devised is not an "asset" in hands of executors, and its title passes direct to specific devisees pursuant to terms of will, which has effect of a"conveyance"."It is this concept which has caused the plaintiff the most difficulty. In all his papers, and in all these six cases that we have been involved in, he keeps referring to the fact that there is no deed from the executor and therefore, the executor must still own the property. He has raised this point in every case and simply as a layman does not understand that a deed is not required under the laws of the State of New York to pass title upon the death of the testator. It is the reason

he keeps questioning why he was not given notice of the sale. The Court below cited the authority, New York Real Property Law Section 248 (McKinney 1968) which sets forth clearly that a tenant is not required to be given notice of a sale. In addition to this of course, the estate was not the owner of the property at the time of the sale in 1969, and in addition, at the time of the fire in July of 1970, the Church had been paying rent to the new landlord for one and one-half years. After seventeen months of paying rent to MT. SINAI HOSPITAL, the plaintiff cannot now contend that he was surprised that MT. SINAI HOSPITAL had taken over the property.

In 1969, at the time of the sale, and in July of 1970, the defendants had absolutely nothing to do with the premises known as 1292 Park Avenue, New York, and owed absolutely no duty to the plaintiff.

Title to the property had been out of the hands of the defendants since December 20, 1965, the date of death of KATARINA SCHERER.

II

ALL OF THE CLAIMS RAISED BY THE PLAINTIFF HAVE BEEN COVERED IN THE MULTIPLE SUITS BROUGHT BY THE PLAINTIFF IN BOTH THE FEDERAL AND STATE COURTS. THERE IS NO BASIS FOR FURTHER RELIEF IN THIS NEW ACTION COMMENCED IN 1973 .

As has been stated, the plaintiff is now in his sixth law suit covering these same points. The Court below stated that there was no requirement of notice and the statute of limitations had run against the plaintiff. In addition, Judge METZNER stated:

> "It appears that any other claims which might be set forth in the complaint in this case have been dealt with adversely to the plaintiff in one of his four previously filed cases in the state and federal courts."

Judge TYLER, in his opinion, 73 Civ.3069 (S.D.N.Y.) November 5, 1973, (copy of decision in the record) stated that the decisions of Special Term New York Supreme Court were res judicata to the extent where plaintiff is seeking the same relief. Judge TYLER was speaking of Justice BLOUSTEIN's decision of January 23, 1973, regarding the case by the plaintiff against the DE ROSA's (the legatees). There is a similar decision by Justice AMSTERDAM for the Executor and the Estate of KATARINA SCHERER dated September 11, 1973, see copy of decision in the record. Hence the decisions

(1) A good review of plaintiff's status is contained on Page 4 of Judge TYLER's decision.

of Special Term barring the right of recovery are res judicata as to the current suit. Plaintiff claims to have an action arising out of a lease. He has commenced actions in the New York State Court and has lost. Now he enters the Federal Courts and by twisted and tortured language attempts to raise some Federal questions. But Judge LASKER in the very first case (and as cited in Judge TYLER's opinion) said it clearly in speaking of this plaintiff when he stated that the complaint related to the breaches of certain covenants in a lease and consequental damages resulting from the breach of the leasehold contract. Judge LASKER went on to say:

> "These are wholly questions of state law and they do not become federal questions simply by reciting the provisions of the Constitution of the United States that property shall not be taken without due process of law. There is no allegation that the named defendants acted under color of state law in causing the alleged acts to take place."

The sole remedy of the plaintiff for an alleged breach of the lease is an action in the New York State Courts. He has tried it and lost. He has not shown any reason or authority why this Court should now give him a replay of the same causes of action. The Court below saw through this feeble attempt to gain federal jurisdiction and dismissed the complaint. That decision should be allowed to stand.

III

THE STATUTE OF LIMITATION HAS RUN AGAINST THE PLAINTIFF FOR HIS ALLEGED CAUSE OF ACTION ON THE LEASE.

The main thrust of the plaintiff's complaint is an action on contract. This arises out of the alleged breach of the lease. There is no way that the plaintiff can commence an action in October of 1973 against the Estate of a woman who died on December 20, 1965. The statute is very clear, the Civil Practice Law and Rules, Section 213 requires that an action on contract must be commenced within six years.

Justice BLOUSTEIN in his decision of January 26, 1973, covered this exact point (copy of opinion in record) when he said, (speaking of the legatees):

> "Even assuming, as we must on a motion of this type that the allegations that the advertisement was a fraud and that the defendants were the landlords and published it, the plaintiff had knowledge of the facts at or about the time of the signing and commencement of the lease in 1961 or at least by the termination of the lease agreement in 1964. Consequently, the statute of limitations had run. (CPLR 213).
>
> Further, assuming that the collection of rent by the defendants was in violation of the Multiple Dwelling Law, Sections 301 and 302, in that the premises which did not have a certificate of occupancy was covered in the statute,

> and that the plaintiff has a cause of action for a recovery of rent paid while the violation was in effect, the action is similarly barred by the statute of limitations. Since the statute in question is penal in nature (Wakol v. Sequin 167 Misc.463) and defendants last owned the premises on Feb. 1969 and since the action was not commenced until March 1972, the three-year statute of limitations had expired. (CPLR 214(2)).

This same logic would apply even more so to the defendants who last held title on December 20, 1965. The plaintiff's attempt to commence an action in October of 1973, almost eight years after the defendants held title, is completely barred by the statute of limitation.

IV

THE STATUTE OF LIMITATION HAS RUN AGAINST THE PLAINTIFF FOR HIS ACTION IN TORT.

In the statute covering actions for personal injury, Section 214 of the Civil Practice Law and Rules of the State of New York an action must be commenced within three years.

The defendants last owned the property on December 20, 1965. This lapse of eight years completely bars an action commenced in October of 1973. Even for the sake of argument if one went back to the date of sale by the legatees in January of 1969, or even to the fire in July of 1970 (when the landlord was MT. SINAI HOSPITAL) the three year statute would have expired for any claim in July of 1973. By what authority does he now commence an action on October 19, 1973? Judge METZNER in his decision covers this point precisely when he said:

> "The negligence claims set forth in the complaint are clearly barred by the three year statute of limitations applicable in this diversity action under Section 214 of the New York Civil Practice Law and Rules."

The plaintiff can offer no authority for

overcoming this bar as to the personal injury action, nor can he offer any authority for overcoming the time bar in the contract as set forth in Point III supra.

V

THE PLAINTIFF IS THE WRONG PARTY IN INTEREST AND IS NOT ENTITLED TO ANY RELIEF.

The original lease was signed by KATARINA SCHERER and the MISSIONERS PARENT CHURCH on February 15, 1961. The plaintiff signed MISSIONERS PARENT CHURCH by GRANVILLE HINTON as President. The Church is a religious corporation under the laws of the State of New York.

There has never been an assignment of the lease to the plaintiff which has been signed by the defendants as landlord.

Paragraph 4th of the lease prohibits the assignment of the lease without the consent of the landlord in writing.

The plaintiff knew this when he first started his action. M.P.CHURCH and G. HINTON v. KATARINA SCHERER, 70 Civ.1082 in the Southern District. He quickly withdrew this action when he discovered that a corporation had to appear by attorney.

Thus the plaintiff as an officer of a religious corporation has no right to simply take over a lease without an assignment consented to by

the landlord.

This once again points up the fact that his rights if any lie within the four corners of the lease. A simple action on a lease belongs in the state court, not in the Federal Court.

CONCLUSION

The action of Judge METZNER in granting Summary Judgment to the defendants is correct and the decision should be allowed to stand.

Respectfully submitted,

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STATE OF NEW YORK
COUNTY OF NEW YORK

MARY TIERNEY, being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 25 Cooper Street, New York, N.Y.

On October 17th, 1974 deponent servedan Original and two copies of the within Brief of Appellee upon Granville Hinton, plaintiff-appellant in this action at % Jerome Meckler, Esq. 30 East 42nd Street New York, N.Y. 10017, the address designated by said plaintiff-appellant, for that purpose by depositing a true copy (3) of same enclosed in a post-paid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Mary Tierney

Sworn to before me
this 17th day of October 1974.

FRANCIS J. COUGHLIN
Notary Public, State of New York
No. 30-5835450
Qualified in Nassau County
Certificate filed in New York County
Commission Expires March 30, 1976